TENASWARI RAJEN & ANOR
v. KAPTEN MARITIM MOHAMMAD ROSLI KASSIM PENGARAH MARITIM NEGERI SELANGOR & ORS

HIGH COURT MALAYA, SHAH ALAM
ALICE LOKE YEE CHING J
[WRIT SUMMONS NO: BA-21NCVC-24-05-2020]
28 JULY 2025

Abstract – *A custodial authority owes a duty of care to a detainee to prevent foreseeable self-harm, and this duty extends to ensuring the physical environment and the actions of the authority do not facilitate suicide. The act of the deceased, in this case, did not constitute a novus actus interveniens that breaks the chain of causation. Where the authority's negligence directly enables the suicide, liability for the death falls entirely on the authority. The court will not apportion blame to the deceased in such a situation.*

TORT: *Negligence – Duty of care – Custodial duty of care – Detainee committed suicide during detention – Detainee hung himself from grill using extra pants provided by custodial authority – Whether detainee's death foreseeable – Whether custodial authority owed duty of care – Whether duty of care extended to self-harm – Whether custodial authority in breach of duty of care – Whether there was negligence – Whether defence of novus actus interveniens applied – Whether detainee contributorily negligent*

TORT: *Negligence – Damages – Claim for – Detainee committed suicide during detention – Detainee hung himself from grill with extra pants provided by custodial authority – Claim for damages by wife and father of detainee in personal capacity and capacities as dependants and as co-administrators of estate of deceased detainee – Whether claim ought to be allowed – Civil Law Act 1956, ss. 7 & 8*

TORT: *Statutory duty – Breach – Claim for damages – Detainee committed suicide during detention – Detainee hung himself from grill using extra pants provided by custodial authority – Whether there was breach of statutory duty – Whether particulars and relevant laws on alleged breach pleaded*

TORT: *Misfeasance in public office – Claim for damages – Detainee committed suicide during detention – Detainee hung himself from grill using extra pants provided by custodial authority – Allegations that detainee was threatened and assaulted after his arrest and reckless indifference as to his welfare – Whether actions of alleged tortfeasors caused detainee to commit suicide – Whether ingredients of misfeasance in public office established*

The deceased and another individual were apprehended during an operation carried out by the Maritime Enforcement Agency Malaysia ('MEAM'). The boat that they were on had carried drugs. The deceased was then ordered by the Magistrates' Court to be remanded for a period of seven days at the lockup of the MEAM office. Before the deceased was brought to the lockup, he complained of pain at the head region. The deceased was sent to the hospital where he was diagnosed with stress headache. Subsequent to his treatment, the deceased was brought to the MEAM building and placed in the lockup. Four days later, the lifeless body of the deceased was found hanging from the ceiling of the lockup; he had used a pair of pants, which was the attire provided to him whilst in the lockup, to hang himself. The wife ('first plaintiff') and father ('second plaintiff') of the deceased brought the present action, in their personal capacity, and in their capacity as dependants under s. 7 of the Civil Law Act 1956 ('Act') and also as the co-administrators of the estate of the deceased under s. 8 of the Act, against, the first to third defendants, namely, the Director of the Selangor MMEA Office at the material time, the investigating officer and the Government of Malaysia, respectively. The plaintiffs' claim against the defendants was founded upon the tort of negligence, breach of statutory duties and misfeasance in public office. In view of the actions of the defendants, the plaintiffs sought general, aggravated and exemplary damages. The defendants, on the other hand, averred that (i) the deceased's death was not caused by their negligence but by the voluntary act of the deceased and this act broke the chain of causation between the defendants' breach and the death; and (ii) liability ought to be apportioned as the deceased ought to be responsible for taking his own life.

Held (allowing claim in negligence):

(1a) The duty of care on the part of the defendants, to take reasonable care of the deceased, extended not only to prevent harm caused by third parties but by the deceased inflicting self-harm. The deceased hung himself from the grill on the ceiling using the extra pair of pants he was provided with. In other words, the grill and the pants provided the very means by which he harmed himself. It was negligent on the part of the defendants to have provided him the spare pants. Whilst the pants, as an attire, is ordinarily innocuous and harmless, it has the potential of being dangerous when provided to a detainee. The presence of a grill ought to have also raised a red flag. The defendants obviously overlooked this. (paras 40, 47, 50 & 52)

(1b) The CCTV played during trial showed that at: (i) 6.05am to 6.52am, the deceased was awake and appeared restless. Between this time he was sitting behind and on the partial wall, on the floor, holding the grill and looking out the cell; (ii) 6.55am, his intentions became more obvious when he climbed on the partial wall and sat there; and

(iii) 7.02am, he stood up on the wall to hang the pants and hung himself shortly thereafter. Had there been a continuous monitoring of the CCTV or, at the very least, at shorter intervals than the hourly intervals, the deceased could have been prevented from carrying out the suicide. The lack of closer monitoring caused those on duty to miss the entire actions of the deceased just prior to his suicide. (paras 55-57)

(1c) The defendants failed to take reasonable care to prevent the death of the deceased. There was a clear breach of duty when the deceased was provided with an extra pair of pants in the presence of a grill in the lockup and where the risk of suicide was not unforeseeable with detainees. This was coupled with the lack of monitoring. The defendants were therefore liable in negligence. (paras 59 & 60)

(2) The deceased's death was the very event the defendants' duty was directed at. It was not open to the defendants to contend that the actions of the deceased broke the chain of causation. The act of the deceased did not constitute an independent intervening act as it flowed from the defendants' breach. Liability ought not to be apportioned. The deceased was in a position of extreme mental stress. It would be unconscionable to expect the deceased to bear some part of the blame for his death, especially when the defendants' own actions afforded him an opportunity to take his own life. But for the defendants' negligence, the plaintiff would not have committed suicide. (paras 64 & 65)

(3a) The plaintiffs' pleadings revealed, at best, a vague reference to a breach of statutory duty. The law upon which the duty was said to have arisen from was not mentioned. However, in the written submissions of the plaintiffs, the alleged breach of statutory duty was elaborated on. The plaintiffs contended that the detention of the deceased in the MEAM's lockup was in contravention of the Prisons Act 1995 in that the lockup the deceased was detained must first be gazetted a place for confinement of persons. The fact of gazettement was material and must be pleaded in order to afford an opportunity for the defendants to respond. (paras 67 & 68)

(3b) The plaintiffs were bound by their pleadings and ought not to be allowed to raise an unpleaded point in submission. The plaintiff could not be allowed to take the defendants by surprise on an unpleaded fact. This point, *ie*, breach of statutory duty, was not considered as it would be tantamount to a denial of justice to the defendants who were not allowed to respond by evidence led on their behalf. (paras 68 & 70)

(4) The plaintiffs sought to establish, from the cross-examination of the defence witnesses, a case of assault at the time of arrest, denial of/neglect in the provision of food and inhumane treatment in the lockup cell, as well as being subject to threats by one of the MEAM officers. Raising facts and allegations in cross-examination is not equivalent to adducing evidence from a party itself. There was no credible evidence from the plaintiffs' own case to substantiate the allegations raised in cross-examination. All the allegations were denied by the defence witnesses. The plaintiffs could have called the medical doctor who examined the deceased after his arrest to establish a case of assault at the time of his arrest. Bearing in mind the ingredients of the tort of misfeasance in public office, the evidence did not even suggest remotely a case of misfeasance in public office. (para 73)

(5) The plaintiffs were awarded: (i) RM6,370 in special damages; (ii) RM5,000 for funeral expenses; (iii) RM10,000 for bereavement (for the first plaintiff only); (iv) loss of earnings in the amount of RM172,800 (in the proportion of 80:20, for the benefit of the first plaintiff and her three children, and the second plaintiff and his wife, respectively); and (v) costs of RM30,000. (paras 78, 79, 83, 84, 88 & 89)

Case(s) referred to:

Alliance Connext Sdn Bhd & Anor v. Wangsa Budimas Sdn Bhd [2022] 1 CLJ 173 CA ***(refd)***

Ashley v. Chief Constable of Sussex Police [2008] 2 WLR 975 ***(refd)***

Asia Pacific Land Bhd & Ors v. Datuk Bandar Kuala Lumpur [2005] CLJU 253; [2005] 1 LNS 253 HC ***(refd)***

Child N (claiming through her father) & Ors v. Kerajaan Malaysia [2022] 1 MLJ 666 ***(refd)***

Datuk Seri Khalid Abu Bakar & Ors v. N Indra P Nallathamby & Another Appeal [2014] 9 CLJ 15 CA ***(refd)***

Fadhelah Othman v. Mohamad Sukri Hat & Ors [2024] 7 CLJ 916 HC ***(refd)***

Ketua Polis Negara & Ors v. Nurasmira Maulat Jaffar & Ors And Other Appeals [2018] 1 CLJ 585 ***(refd)***

Ketua Setiausaha Kementerian Dalam Negeri & Yang Lain lwn. Ghaur Chandram Murugesu & Satu Lagi Rayuan [2016] 3 CLJ 210 CA ***(refd)***

Koperal Zainal Mohd Ali & Ors v. Selvi Narayan (Pentadbir Bersama Estet Dan Tanggungan Chandran Perumal, Si Mati) & Anor [2021] 6 CLJ 157 FC ***(refd)***

Lok Kok Beng & Ors v. Loh Chiak Eong & Anor [2015] 7 CLJ 1008 FC ***(refd)***

Muthammal Rose Udayar & Anor v. ACP A Paramasivam & Ors [2011] CLJU 1565; [2011] 1 LNS 1565 HC ***(refd)***

Reeves v. Commissioner of Police of the Metropolis [2000] 1 AC 360 ***(refd)***

Samuel Naik Siang Ting v. Public Bank Bhd [2015] 8 CLJ 944 FC ***(refd)***

Tan Wei Hong & Ors v. Malaysia Airlines System Bhd & Ors [2018] 2 CLJ 84 CA ***(refd)***

Tenaga Nasional Malaysia v. Batu Kemas Industri Sdn Bhd & Another Appeal [2018] 6 CLJ 683 FC ***(refd)***

Legislation referred to:
Civil Law Act 1956, ss. 7(3A), (3B), 8
Dangerous Drugs Act 1952, s. 39B
Government Proceedings Act 1956, ss. 5, 6

For the plaintiff - Manoharan Malayalam, P Subramaniam & Sarathbala Balakrishnan; M/s M Manoharan & Co
For the 1st, 2nd & 3rd defendants - Siti Syakimah Ibrahim; SFC & Nuurzul Izzati Zulkipli; FC

Reported by Najib Tamby

JUDGMENT

Alice Loke Yee Ching J:

Introduction

[1] The deceased died tragically by committing suicide whilst he was detained in the custody of the defendants. This suit, founded on negligence, breach of statutory duty and misfeasance in public office, is brought by the plaintiffs as administrators of the deceased's estate, his dependants as well as in their personal capacity.

Background Facts

[2] On 9 January 2019, at about 7.15am, some officers from the Maritime Enforcement Agency Malaysia ("MEAM") were patrolling the waters off the coast of the state of Selangor. At the material time, they were conducting a special operation, having received prior information about a particular boat which departed from the Sungai Belankan, Tanjung Rhu jetty.

[3] Upon keeping a lookout, they sighted the boat which was being driven in a suspicious manner. They gave chase. Shortly thereafter, they succeeded in apprehending the boat. On the boat was the deceased, Thinagaran a/l Madhavan and another person named Inthiran a/l Rajendran ("Inthiran"). They were promptly taken into custody. On their boat, some packages were found. These were later tested to be drugs.

[4] Both the deceased and Inthiran were produced before the Sepang Magistrate later at night for a remand order for the purpose of an investigation under s. 39B of the Dangerous Drugs Act 1952. The Magistrate ordered for both the detainees to be remanded for a period of seven days at the lockup of the MEAM office in Klang, Selangor.

[5] Before the deceased was brought to the lockup pursuant to the remand order, he complained of pain at the head region. Leftenan Maritim Norakma binti Hassan the second defendant, was the investigating officer of the case. She directed that the deceased be sent for treatment at the Hospital Tengku

Ampuan Rahimah Klang. He was seen by a doctor and diagnosed to have stress headache and given medication for it. Subsequent to his treatment, he was brought to the MEAM building and placed in the same lockup as Inthiran.

[6] Four days later, at about 6.30am on 13 January 2019, the lifeless body of the deceased was found hanging from the ceiling of the lockup. He had used a pair of pants to hang himself. This attire was provided to him whilst he was in the lock-up. At the material time, the lock-up was monitored through a CCTV. The CCTV recording was tendered in evidence. Some of the photo shots of the CCTV recordings showing the critical moments of the deceased's actions were also adduced in evidence.

[7] Upon viewing the CCTV, it was found that the deceased had hung the pants from a grill on the ceiling. He then stepped on a partial concrete wall in the lockup in order to hang himself from the pants.

[8] His body was sent to Hospital Tengku Ampuan Rahimah Klang for post mortem. The pathologist's findings were that the cause of death of the deceased was consistent with hanging.

[9] The plaintiffs were informed of the death of the deceased on the evening of the same day.

The Parties

[10] The plaintiffs are the wife and father of the deceased respectively. The present action is brought in their capacity as dependants under s. 7 of the Civil Law Act 1956, and also as co-administrators of the estate of the deceased under s. 8 of the Civil Law Act 1956. Letters of Administration were obtained on 20 August 2019. In addition, they have also brought this suit in their personal capacity.

[11] The first defendant was the director of the Selangor MEAM office at the material time. He was in charge of the entire operations and security of the lock up, particularly the implementation of lock up procedures to ensure the safety of detainees.

[12] The second defendant was the investigating officer in respect of the crime the deceased was detained.

[13] The third defendant, the Government of Malaysia is cited as an employer vicariously liable for the actions and omissions of the first and second defendant, and other of its officers and servants pursuant to ss. 5 and 6 of the Government Proceedings Act 1956.

The Plaintiffs' Claim

[14] The plaintiffs claim against the defendants, is founded upon the tort of negligence, breach of statutory duty and misfeasance in public office. In relation to the cause of action in negligence, particulars of this claim have been set out in para. 29 therein. The essence of their complaint is that the

defendants owed a duty of care to ensure the safety of the deceased whilst he was in their custody. This they failed to do. Their failures are essentially as follows:

(i) failed to undertake the necessary supervision of the deceased at all material times;

(ii) failed to regularly monitor the deceased through the CCTV;

(iii) failed to ensure the lockup was safe for the detention of the deceased; and

(iv) put the deceased at risk of harm by providing him with a second pair of pants in the lock-up where there was a grill where it was foreseeable that the deceased would harm himself.

[15] There were numerous other particulars of negligence listed which were either too generally worded or which I do not consider relevant to the plaintiffs' case of negligence. For that reason, I have omitted to set them out here.

[16] In addition, the plaintiffs also claim that the defendants breached their statutory duty in failing to comply with the rules and law pertaining to the detention of the deceased in a lockup. The office of the MEAM was not a designated lockup at the material time.

[17] Finally, the plaintiffs allege misfeasance in public office on the part of both the first and second defendant, and servants of third defendant. They claim that the deceased was threatened and assaulted after his arrest as there were injuries found on the deceased which were allegedly caused by MEAM officers at the time of arrest. Whilst he was in custody, the defendants exhibited a reckless indifference as to the welfare of the deceased. Their cumulative actions caused the deceased to commit suicide.

[18] In view of the actions of the defendants, the plaintiffs now seek to be compensated in general, aggravated as well as exemplary damages.

[19] The evidence in support of the plaintiffs' case was adduced by the plaintiffs themselves. Their evidence in court was primarily on the issue of damages which I shall deal with in the later part of this judgment. Their case on liability against the defendants was sought to be established from the defence's oral and documentary evidence.

The Defence Case

[20] The defendants deny all the allegations of negligence, breach of statutory duty and public misfeasance made against them. They contend that there was no duty of care owed to the deceased as his death was not foreseeable. Even if a duty of care was owed, they had taken all due measures to ensure the safety of the deceased.

A **[21]** Further, even if the defendants were negligent, the deceased contributed to his death as it was due to his own actions. Finally, the defendants plead *novus actus interveniens* to contend that the deceased's death was independent of the actions of the defendants. His actions were the direct cause of his death. In the circumstances, no liability ought to be found against
B them in this particular instance.

[22] Five witnesses testified for the defence, including both the first and second defendants, in support of the defence case to refute the allegations of negligence, breach of statutory duty and misfeasance in public office. Their evidence can be summarised as follows.

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[23] DW1 was the arresting officer. He testified as to the circumstances pertaining to the arrest. He observed there were injuries on the face and head of the deceased at the time of arrest. The deceased informed him that the injuries were sustained during the boat chase when he and Inthiran attempted to avoid arrest.

D

[24] DW2 the investigating officer (and the second defendant), gave evidence as to her actions upon being handed the deceased by DW1. She noticed an injury at the back of deceased's head. Upon enquiring from DW1, he told her that the deceased injured himself whilst avoiding arrest. However,
E in view of his injury, she ordered for the deceased to be brought for treatment at the Klang Hospital before he was brought to the lock-up. After the deceased was detained at the MEAM office, she saw him on two consecutive days, 11 January 2019 and 12 January 2019. He appeared well and showed no indication of distress until she was informed on 13 January 2019 at 6.50am that he committed suicide. Upon such information she sent the body
F for a post-mortem.

[25] DW3 was the officer in charge of security at the material time. He was on a 24-hour duty from 8am, 12 January 2019 to the following day. His duty included supervising and patrolling the lock-up vicinity every two hours,
G which he duly recorded in the log book. He did not observe anything untoward about the deceased. At 6am on 12 January 2019, the deceased was observed to be well.

[26] DW4 was on duty at the Pusat Operasi Maritim ("PUSOP") at the material time. PUSOP is housed in another block of the MEAM office, and
H located about 50 meters from the lockup. DW4's duties at PUSOP included monitoring the CCTV. The lockup in which the deceased was placed had a CCTV. The CCTV monitors were located on the second floor of PUSOP.

[27] On 13 January 2019, DW4 monitored the CCTV at hourly intervals from 2am to 6am. The last time he observed the CCTV was at 6.15am. At
I that time, he observed the deceased to be sitting behind a partial wall in the lock-up. There was nothing untoward noticed. Shortly after, he was notified that the deceased had hung himself.

[28] DW5 is the first defendant himself. He was the director of the MEAM Selangor at the material time, and was responsible for the entire operations of the office, including matters pertaining to security. He was aware of the deceased's arrest and detention. He personally saw the deceased on several occasions. He stated that the family of the deceased was allowed to see him whilst in detention. On 13 January 2019, at about 6.40am, he was notified about the deceased's suicide. He then viewed the CCTV and found the deceased to have used the extra pair of pants he was provided with, to hang himself.

Issues To Be Tried

[29] The determination of this case turns on both issues of law and fact. On the claim premised on negligence, the following issues fall to be decided:

(i) in view of the issue raised by the defence that his death was not foreseeable, whether a duty of care exists;

(ii) whether the defendants were in breach of the duty of care;

(iii) whether the defence of *novus actus interveniens* applies in the circumstances of this case; and

(iv) whether the deceased was contributorily negligent.

[30] As for the claim for breach of statutory duty and public misfeasance, this court will have to decide whether the evidence presented before this court supports the plaintiffs' case on these two causes of action.

[31] Finally, in the event liability is established on these causes of action, the appropriate award of damages to be made.

Analysis And Findings Of This Court

Negligence

[32] I shall deal with the claim on negligence first. The ingredients essential for a case in negligence was succinctly set out by the Court of Appeal in *Tan Wei Hong & Ors v. Malaysia Airlines System Bhd & Ors* [2018] 2 CLJ 84; [2017] 4 MLJ 540 held as follows:

> [21] Perhaps, in order to better appreciate the issues raised by the parties, it is helpful to note briefly on the law of negligence. There are five distinct elements of negligence:
>
> (a) that the defendant had a obligation to the plaintiff to take care (*ie*, he owed a duty of care to the plaintiff);
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> (b) that the defendant should have observed a particular standard of care in order to fulfil or perform that duty;
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> (c) that the defendant breached his duty of care by failing to fulfil or observe the relevant standard of care;
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> (d) that the breach of duty caused harm to the plaintiff; and

(e) that such harm was not too remote or unforeseeable such that the defendant is to liable for its occurrence

(see *Fridman, Gerald Henry Louis, The Law of Torts in Canada*, Vol I, Toronto, Carswell 1989, at p 317).

[33] It is trite law that the first element to prove in a negligent action is the existence of a duty of care owed to a plaintiff. The defendants argue that they owe no duty of care to the deceased as it was not foreseeable that the deceased would commit suicide.

[34] The question whether a duty of care is owed in any given situation is one that is very much dependant on the factual situation. However, the law on the issue has now developed to what is referred to as the *Caparo* test, which gives valuable guidance on the consideration the court is to embark on.

[35] In *Lok Kok Beng & Ors v. Loh Chiak Eong & Anor* [2015] 7 CLJ 1008; [2015] 4 MLJ 734, the Federal Court held at p. 1025 (CLJ); p. 752 (MLJ):

> To put it in a nutshell the preferred test is the three-fold test, where the requirements of foreseeability, proximity and policy considerations must exist in any claim for negligence. The three-fold test has been recognised by the House of Lords in *Caparo Industries Plc v. Dickman* [1990] 2 AC 605, as the elements giving rise to a duty of care. In the judgment of Lord Bridge in *Caparo* at pp. 617-618, His Lordship said that:
>
> > What emerges is that, in addition to the foreseeability of damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterised by the law as one of 'proximity' or 'neighbourhood' and that the situation should be one in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope on the one party for the benefit of the other.
>
> The most difficult ingredient to prove in establishing a duty of care is the requirement of sufficient proximity between the claimant and the defendant. The court would have to look at the closeness of the relationship between the parties and other factors to determine sufficient proximity based on the facts and circumstances of each case. These factors are likely to vary in different categories of cases.

[36] The *Caparo* test was re-affirmed by the Federal Court in *Tenaga Nasional Malaysia v. Batu Kemas Industri Sdn Bhd & Another Appeal* [2018] 6 CLJ 683; [2018] 5 MLJ 561.

[37] Reverting to the facts of this case, as a detainee, the deceased was in the custody and care of the defendants and/or their officers. He had been detained pursuant to a remand order obtained by the investigating officer. His liberty was curtailed for the duration of the remand period. His movements

were under the control and close supervision of the defendants. In view of this, I find that the ingredient of sufficient proximity of relationship has been established to give rise to a duty of care.

[38] By way of illustration, in *Ketua Setiausaha Kementerian Dalam Negeri & Yang Lain lwn. Ghaur Chandram Murugesu & Satu Lagi Rayuan* [2016] 3 CLJ 210, the Government and its officers were held liable in negligence when the deceased, a prisoner at the Sungei Buloh prison, died from a fight which ensued during food distribution. The defendants were held liable in failing to prevent his death.

[39] Imposing a duty of care to prevent harm by third parties on account of a detainee being in the custody and care usually presents no difficulty. The situation is however, less straightforward when the harm is inflicted by the deceased himself. It is in this scenario that the defendants argue as it was unforeseeable that the deceased would commit suicide, no duty of care ought to be imposed.

[40] I am of the view that the duty of care on the part of the defendants to take reasonable care of the deceased extends not only to preventing harm caused by third parties, but by the deceased inflicting self-harm.

[41] In this regard, the House of Lords case of *Reeves v. Commissioner of Police of the Metropolis* [2000] 1 AC 360 is particularly instructive. In *Reeves* (*supra*), the deceased was remanded on charges of credit fraud and for handling stolen vehicles. He had made two previous attempts at suicide. As a suicide risk, he was frequently observed. However, the defendant's officers were negligent by inadvertently leaving the flap of the cell door open, which allowed the deceased to tie his shirt through the spy hole on the outside of the door and hang himself.

[42] The House of Lords had no hesitation in finding a duty of care to exist. Lord Hope held:

> In my opinion, it is necessary at the outset to identify the duty which was owed to the deceased by the commissioner. There is no doubt that the commissioner was right to concede that he owed a duty of care to the deceased while he remained in police custody. The deceased had been identified as a suicide risk, having on two previous occasions attempted to strangle himself with a belt after being placed in a cell. It was the commissioner's duty to take reasonable care not to provide him with the opportunity of committing suicide by making use of defects in his cell door. The risk was not that he would injure himself accidentally if given the opportunity, but that he would do so deliberately. That is the nature of an act of suicide by a person who is of sound mind. It is a deliberate act of self-destruction by a person who intends to end his own life. So I think the commissioner's duty can most accurately be described as a duty to take reasonable care to prevent the deceased, while in police custody, from taking his own life deliberately.

A ...

As a general rule, the common law duty of care is directed towards the prevention of accidents or of injury caused by negligence ...

...

B But the duty of care may sometimes extend to preventing people from injuring themselves deliberately.

... the situation which may arise where a person who is of sound mind is deprived of this liberty and put in prison or detained in custody by the police. The duty of those who are entrusted with his custody is to take reasonable care for his safety while he remains in their hands. If it is C known that he may engage in self-mutilation or suicide while he is in their custody, their duty is to take reasonable care to prevent him from engaging in these acts so that he remain free from harm until he is set a liberty. This duty is owed to the prisoner if there is that risk, irrespective of whether he is mentally disordered or of sound mind. It arises simply D from the fact that he is being detained by them in custody and is known to be at risk of engaging in mutilation or of committing suicide.

[43] Another of the Law Lords, Lord Hoffman held:

The police and prison authorities have long been aware that prisoners are more than usually likely to attempt suicide or self-injury...The risk of E suicide is particularly high among prisoners on remand facing a new environment and an uncertain future.

...

The duty, as I have said, is a very unusual one, arising from the complete control which the police or prison authorities have over the prisoner, F combined with the special danger of people in prison taking their own lives.

[44] To reiterate, in *Reeves* the existence of duty of care is not in issue. The passages set out above made it clear that a duty of care exists when a person is in the custody of another. It is therefore not open for the defendants to G argue that a duty of care was owed to the deceased at the material time.

[45] Defence counsel referred to the above case and sought to distinguish *Reeves* in that the deceased was a known suicide risk and therefore a duty of care was imposed on the defendant. There had a previous history of H attempted suicide. I am of the view that the facts are barely distinguishable. Judicial notice can be taken of the fact that persons in custody are susceptible to mental stress from being in custody. They are vulnerable to depression and hence suicidal impulses is not unforeseeable. The deceased here was arrested and detained for investigation into a drug trafficking offence. One can expect him to be under extreme mental distress from the fact of being detained for I a capital offence. It was not unforeseeable that he would be a suicide risk.

[46] Closer home, the case of *Fadhelah Othman v. Mohamad Sukri Hat & Ors* [2024] 7 CLJ 916; [2024] 11 MLJ 488 demonstrated the court's readiness to hold that a duty of care is owed to persons in custody and such duty includes the duty to ensure the safety of the person in custody and to ensure that they do not harm themselves or commit suicide.

[47] Having determined that a duty of care exists, the next question to consider is whether the defendants breached the duty. Returning to the facts of this case, the deceased hung himself from the grill on the ceiling using the extra pair of pants he was provided with. In other words, the grill and the pants provided the very means by which he harmed himself. The crucial question to consider is whether the defendants were negligent in providing an opportunity for the deceased to harm himself.

[48] It was in evidence that when the deceased was placed in the lock-up, he was provided with two pairs of pants. One was for him to wear, and the other was a spare. The officers on duty noticed that he used the spare pants as a pillow.

[49] The first defendant was cross-examined as to the standard operating procedures ("SOP") applicable to detainees. He stated that in handling detainees, MEAM is governed by their SOP and the Director General's standing orders. However, he admitted in cross-examination that whilst the provision of attire was stated in the SOP, the requisite number was not stated.

[50] I find that it was negligent on the part of the defendants to have provided him the spare pants. Whilst pants as an attire and ordinarily innocuous and harmless, it has the potential of being dangerous when provided to a detainee. The defendants were obviously not alert to the possibility of this piece of clothing being used by the deceased to harm himself. DW3 stated that the deceased had used it as a pillow. It is unfathomable for the deceased to be provided with another set of pants only to be used as a pillow. It would appear that there was a careless disregard of the potential harm to which this attire could be put to.

[51] DW5 (first defendant) in his evidence said that prior to being placed in the lock-up, a detainee would be thoroughly checked to ensure that weapons or instruments likely to cause harm is not present on his person. Having taken precaution in this aspect, he failed to consider the other aspect of security when the deceased was provided with an item which was capable of harm.

[52] The accused hung the extra pair of pants from a grill that was on the ceiling. DW5 in his evidence stated that the grill was installed as there was a previous escape by a detainee. Unfortunately, the grill and the pants became the very means for the deceased to harm himself. There is a further reason not to have provided the deceased with the extra pair of pants. The

presence of a grill ought to have raised a red flag. The defendants obviously overlooked this. They should have taken steps to avoid exposing the deceased to any danger.

[53] I therefore find that the defendants created the risk of harm to the deceased. They failed to take reasonable care by providing him with the second pair of pants which then gave him the opportunity to commit the fatal act. In the circumstances, I have no hesitation in finding the defendants to have breached their duty of care.

[54] There is also another aspect of their duty in which the defendants failed. A CCTV was installed which allowed monitoring of the lockup. The monitoring was done from another building which housed the PUSOP. At the material time, DW4 was on duty at the PUSOP together with two other officers. The CCTV was viewed hourly. He stated that he last viewed the CCTV at around 6.15am. The deceased was alive then.

[55] The CCTV recording was played during the trial. It would show that at 6.05am to 6.52am the deceased was awake and appeared restless. He was seen to be intermittently moving between various positions. Between this time, he was found sitting behind and on the partial wall, on the floor, holding the grill and looking out of the cell. It was around 6.55am that his intentions became more obvious when he climbed on the partial wall and sat there. At around 7.02am, he stood up on the wall to hang the pants and hung himself shortly thereafter.

[56] In my view, had there been continuous monitoring of the CCTV, or at the very least at shorter intervals than the hourly intervals, the deceased could have been prevented from carrying out the suicide.

[57] The lack of closer monitoring caused DW4 and those on duty with him to miss the entire actions of the deceased just prior to his suicide. DW4 attempted to explain the neglect by stating that the monitoring was required to be done only hourly. In other words, if he had viewed the CCTV at 6.15am as he stated, the next time he was obliged to do so would have been 7.15am.

[58] Monitoring at hourly intervals defeats the purpose of having a CCTV. To my mind, it is installed for continuous monitoring. It made no sense to view the CCTV only hourly as DW3 was already conducting regular patrolling of the lock up. Although DW5 stated that patrolling was expected to be done two-hourly, DW3 in his evidence said that he patrolled the lock up every 30 to 40 minutes. The CCTV monitoring must therefore supplement the regular patrolling. To my mind, had there not been a lapse in the CCTV monitoring, the deceased's death could have been prevented.

[59] Upon considering the totality of the evidence, I find the defendants to have failed in taking reasonable care to prevent the death of the deceased. There is a clear breach of duty when the deceased was with an extra pair of pants in the presence of a grill in the lock up and where the risk of suicide is not unforeseeable with detainees. Coupled with this is the lack of monitoring which could have prevented the deceased from successfully carrying out his intention to commit suicide.

[60] In the circumstances, the defendants are liable in negligence.

Defences Of *Novus Actus Interveniens* And Contributory Negligence

[61] The defendants contend that the deceased's death was not caused by their negligence but by the voluntary act of the deceased. This act broke the chain of causation between the defendants' breach and the death.

[62] When the defence of *novus actus interveniens* is raised, the court will have to consider whether the act of the deceased is attributable to some independent act or event which supersedes the tortious conduct. Putting it another way, the *novus actus interveniens* must constitute an event of such impact that supersedes the wrongdoing of the defendant by breaking the chain of causation.

[63] The same argument was advanced in *Reeves* case and it did not find favour with the House of Lords. The relevant portion of the judgment reads:

> ... *novus actus interveniens* "must constitute an event of such impact that it rightly obliterates the wrongdoing of the defendant." The reference to an independent act superseding the effect of the tortious conduct must, in my view, relate to an act which was outside the contemplated scope of events to which the duty of care was directed. Where such a duty is specifically directed at the prevention of the occurrence of a certain event I cannot see how it can be said that the occurrence of that event amounts to an independent act breaking the chain of causation from the breach of duty, even though it may be unusual for one person to come under a duty to prevent another person deliberately inflicting harm on himself.

[64] In this case, the defendants were under a duty of care to ensure the deceased came to no harm whilst in their custody. His death was the very event their duty was directed at. It is not therefore open to the defendants to contend that the actions of the deceased broke the chain of causation. The act of the deceased did not constitute an independent intervening act as it flowed from the breach of the defendants.

[65] The defence further submit that liability ought to be apportioned as the deceased ought to be responsible taking his own life. However, I am not persuaded that liability ought to be apportioned. The deceased was in a position of extreme mental stress as he was detained for alleged drug trafficking and faced the possibility of the death penalty, if convicted. It would be unconscionable to expect the deceased to bear some part of the blame for his death especially when the defendants own actions afforded him

an opportunity to take his own life. But for the defendants' negligence, the plaintiff would not have committed suicide. I therefore reject the defence of contributory negligence.

Breach Of Statutory Duty

[66] The defendants plea of breach of statutory duty, if it can be considered so, appears to be found in para. 31 of its statement of claim. The paragraph reads:

> 31. Secara tambahan kepada perkara yang telah diplidkan di atas, Plaintif-Plaintif juga memplidkan bahawa Defendan-Defendan, pekerja-pekerja, pengkhidmat-pengkhidmat dan/atau agen-agen Defendan-Defendan telah gagal, enggan dan/atau cuai dan/atau secara sengaja telah gagal, enggan dan/atau cuai untuk mematuhi peruntukan-peruntukan dalam undang-undang sedia dan juga undang-undang lazimnya yang ada bagi menjaga, mengawal, mengawas, menyelia, mengurus serta memberi pertolongan dan perlindungan kepada simati, Plaintif-Plaintif dan keluarga amnya.

[67] From the above pleading, there is at best, a vague reference to breach of statutory duty. The law upon which the duty was said to arise was not mentioned. (See: *Asia Pacific Land Bhd & Ors v. Datuk Bandar Kuala Lumpur* [2005] CLJU 253; [2005] 1 LNS 253; [2006] 2 MLJ 137). However, in the written submissions of counsel for the plaintiffs, the alleged breach of statutory duty was elaborated on. The plaintiffs contend that the detention of the deceased in MEAM's lock up was in contravention of the Prisons Act 1995 in that the lock up the deceased was detained must first be gazetted a place for the confinement of persons.

[68] I consider the fact of gazettement to be material and must be pleaded in order to afford an opportunity for the defendants to respond. The defendants justifiably submitted that the plaintiffs are bound by their pleadings and ought not to be allowed to raise an unpleaded point in submission. I agree.

[69] The law on this is trite. In *Samuel Naik Siang Ting v. Public Bank Bhd* [2015] 8 CLJ 944; [2015] 6 MLJ 1, the Federal Court held:

> It is a cardinal rule in civil litigation that parties are bound by their pleadings and are not allowed to adduce facts and issues which they have not pleaded (see *State Government of Perak v. Muniandy* [1986] 1 MLJ 490; and *Anuar bin Mat Amin v. Abdullah bin Mohd Zain* [1989] 3 MLJ 313). In *Blay v. Pollard & Morris* [1930] 1 KB 628, Scrutton LJ ruled that: 'Cases must be decided on the issues on the record; and if it is desired to raise other issues there must be pleaded on the record by amendment'.
>
> The Supreme Court in *Lee Ah Chor v. Southern Bank Bhd* [1991] 1 MLJ 428, had also emphasised the importance of pleadings and ruled that where a vital issue was not raised in the pleadings it could not be allowed to be argued and to succeed on appeal (see also *AmBank (M) Bhd (formerly known as Arab-Malaysia Bank Bhd) v. Luqman Kamil bin Mohd Don* [2012] 3 MLJ 1 (FC)).

> On the same issue, HRH Raja Azlan Shah FJ (as HRH then was) in *The Chartered Bank v. Yong Chan* [1974] 1 MLJ 157, had also pointed out that 'as the trial judge had decided on an issue which was not raised in the pleadings, the judgment must be set aside and new trial ordered' (see also *Haji Mohamed Dom v. Sakiman* [1956] 1 MLJ 45; and *Kiaw Aik Hang Co Ltd v. Tan Tien Choy* [1964] 1 MLJ 99).

[70] The plaintiffs cannot be allowed to take the defendants by surprise on an unpleaded fact. For this reason, I have refrained from considering this point as it would be tantamount to a denial of justice to the defendants who were not allowed to respond by evidence led on their behalf.

Misfeasance In Public Office

[71] The plaintiffs have also premised their case on misfeasance in public office. Again, combing through their statement of claim, I find a vague reference to this tort in para. 51 in the claim for exemplary damages when the plaintiffs pled the grounds to substantiate their claim for exemplary damages. However, these same reasons were relied upon in their claim for negligence. Notwithstanding the inadequacy in the pleadings, I shall nonetheless deal with this cause of action.

[72] For a claim in public misfeasance to succeed, the requisite elements have been explained in *Datuk Seri Khalid Abu Bakar & Ors v. N Indra P Nallathamby & Another Appeal* [2014] 9 CLJ 15; [2015] 1 MLJ 353 where it was held:

> [33] To sustain a claim of public misfeasance, what the plaintiff is required to prove is as set-out in the case of *Three Rivers District Council v Bank of England* [2003] 2 AC 1; [2000] 2 WLR 1220 which are as follows:
>
> (a) the act complained of had been committed by a public officer purportedly pursuant to his exercise of his public power;
>
> (b) the act committed must be done with malice which Lord Steyn in *Three Rivers* explained as follows:
>
> > First there is the case of targeted malice by a public officer, *ie*, conduct specially intended to injure a person or persons. This type of case involves bad faith in the sense of the exercise of public power for an improper or ulterior motive. The second form is where a public officer acts knowing that he has no power to do the act complained of and that the act probably injure the plaintiff. It involves bad faith inasmuch as the public officer does not have an honest belief that his act is unlawful,
>
> (c) that there is proximity between the deceased and the defendants giving rise to the plaintiff a legal standing to sue; and
>
> (d) that the acts of the defendants had caused material damage to the deceased.

[73] The plaintiffs sought to establish, from the cross-examination of the defence witnesses, a case of assault at the time of arrest, denied/neglect in the provision of food and inhumane treatment in the lock up cell, as well as being subject to threats by one MEAM officer. Raising facts and allegations in cross-examination is not equivalent to adducing evidence from a party itself. I find no credible evidence from the plaintiffs' own case to substantiate the allegations raised in cross-examination. All the allegations were denied by the defence witnesses. The plaintiffs could have called the medical doctor from the Klang Hospital who examined the deceased after his arrest to establish a case of assault at time of arrest. It is a well-established principle that there is no property in a witness. (See: *Alliance Connext Sdn Bhd & Anor v. Wangsa Budimas Sdn Bhd* [2022] 1 CLJ 173; [2022] 2 MLJ 154, Court of Appeal). Bearing in mind the ingredients of the tort of misfeasance in public office, I do the evidence do not even suggest remotely a case of misfeasance in public office.

[74] In the result, I find on a balance of probabilities, the plaintiffs to have succeeded only in establishing their case in negligence.

[75] For the sake of completeness, I will also add that the first and second defendants, whilst they were not the actual tortfeasors as their duties did not include patrolling and monitoring the deceased at the material time, they were superior officers who had authority over the well-being of the deceased. The first defendant stated in his evidence that as the State Maritime Director, he was responsible for the entire operations and security of the maritime office. The second defendant had authority over the deceased as she was the investigating officer. This is a case of systemic failure, as revealed by the evidence, for which the superior officers are to be held responsible. (See *Muthammal Rose Udayar & Anor v. ACP A Paramasivam & Ors* [2011] CLJU 1565; [2011] 1 LNS 1565; [2011] 2 AMR 214).

[76] I note that in this case, the defence did not raise any objections to the first and second defendants being cited as tortfeasors.

Damages

[77] I shall now deal with the issue of damages, starting with the claim for special damages. It is trite law that special damages must be strictly proved. (See: *Child N (claiming through her father) & Ors v. Kerajaan Malaysia* [2022] 1 MLJ 666).

[78] Having perused the pleaded special damages, I find them to the following to have been reasonably incurred and I allow as follows:

(i) Cost of extracting Letters of Administration	RM 5,850
(ii) Post-mortem report	RM 500
(iii) Police report	RM 20
	RM 6,370

[79] The plaintiffs have made a claim on behalf of the dependents under s. 7 of the Civil Law Act 1956 ("CLA"). The dependents are as listed in para. 34 of the statement of claim. The law on s. 7 has since been amended with effect from 31 May 2019. However, as the cause of action arose before the date of coming into force of the amending Act, the claim for bereavement is only for the benefit of the first plaintiff as the spouse, for the amount of RM10,000 and I so allow. (See: s. 7(3A) and (3B) of the CLA).

[80] As for the loss of earnings, the first plaintiff (PW1) testified that the deceased was working as a security guard at the material time with a monthly salary of RM1,000. A letter of offer from Delta Force Security Services & Consultancy Sdn Bhd was adduced in evidence. The contents state that the deceased was to receive a monthly salary of RM1,000 with effect from 1 February 2018. The second plaintiff (PW2) confirmed this in his evidence. In addition, PW2 stated that his son was also working as a part-time fisherman using the fishing boat belonging to PW2 to supplement his income. He estimated the deceased's earnings from his part-time job to be about RM1,800 per month.

[81] The EPF statement of the deceased was also adduced in evidence to show a balance of RM7,057.14 and a contribution by his employer of RM130 for the month of January 2019.

[82] I am satisfied on the documentary evidence that the deceased was gainfully employed at the material time. Although the evidence of a salary slip would provide more certainty as to the amount he was receiving. Considering the circumstances of the plaintiffs, it would be too optimistic to expect good record keeping. Although the plaintiffs claim that the deceased was contributing an amount of RM2,200 per month towards his dependants, I do not find the evidence of this fact. However, bearing in mind that the deceased had three children at the material time with aging parents to support, I find an amount of RM1,200 to be reasonable contribution to his dependents.

[83] The deceased was 31 years of age at the material time. His years of purchase would be 12 ((55-31)/2). Applying the multiplicand of RM1,200, the amount for loss of earnings would be RM172,800. As there are 6 dependents listed, comprising of the first plaintiff and her three children and the second plaintiff together with his wife, it necessary to apportion the amount of RM172,800 in the *ratio* of 80:20, for these two groups of dependants.

[84] A dependency claim under s. 7 of the CLA also allows for funeral expenses. I consider an amount of RM 5,000 to be reasonable and I so award.

[85] Apart from the dependency claim, the plaintiffs have also made a claim for general damages of RM500,000 (para. 52(3) of the statement of claim), presumably for misfeasance in public office. In view of my finding

that the tort was not proved, damages does not arise. Further, this claim was also not addressed in the submissions by counsel, and I would regard the claim as abandoned. For these reasons, the claim is not allowed.

[86] As for the plaintiff's claim for aggravated damages of RM 500,000, there is no merit for this claim. The plaintiffs' claim is allowed on the cause of action of negligence only. There was no evidence of egregious conduct on the part of the defendants to warrant an award of aggravated damages. (See: *Ashley v. Chief Constable of Sussex Police* [2008] 2 WLR 975; *Koperal Zainal Mohd Ali & Ors v. Selvi Narayan (Pentadbir Bersama Estet Dan Tanggungan Chandran Perumal, Si Mati) & Anor* [2021] 6 CLJ 157; [2021] 4 AMR 529). There was also no evidence that the conduct of the defendants caused the plaintiff to suffer additional mental distress beyond what is normal arising from the death of the deceased.

[87] Finally, the claim for exemplary damages of RM500,000 is also not allowed. The law as to the award of exemplary damages in a dependency claim and estate claim has since been settled in *Ketua Polis Negara & Ors v. Nurasmira Maulat Jaffar & Ors And Other Appeals* [2018] 1 CLJ 585; [2018] 3 MLJ 184. The Federal Court held that damages under s. 7 was intended to be compensatory in nature. An award of exemplary damages under s. 7 of the Act was clearly contrary to the legislature's intention in enacting that section. As for the claim for exemplary damages, s. 8 of the Act clearly prohibits such an award. In any event, the submissions of learned counsel did not pursue the claim for exemplary damages.

Conclusion

[88] For the reasons as aforesaid, the plaintiffs' claim in negligence is allowed. I also order that the defendants are to pay the plaintiffs the following amounts:

(i)	special damages;	RM6370;
(ii)	funeral expenses;	RM5,000;
(iii)	bereavement (first plaintiff only); and	RM10,000;
(iv)	loss of earnings	RM172,800;

(in the proportion of 80:20, for the benefit of the first plaintiff and her three children, and second plaintiff and his wife respectively).

[89] Finally, I also order that costs of the action of RM30,000 be paid by the defendants to the plaintiffs.